

1 CENTER FOR DISABILITY ACCESS
2 Dennis Price, Esq. SBN 279082
3 Amanda Seabock, Esq., SBN 289900
4 Elliott Montgomery, Esq., SBN 279451
5 100 Pine St., Ste 1250
6 San Francisco, CA 94111
7 (858) 375-7385; (888) 422-5191 fax
8 DennisP@potterhandy.com

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10 Attorneys for Plaintiff

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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA

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28 **Andres Gomez,**
Plaintiff,
v.
Zackery Sperow,
Defendants.

Case No: 4:21-cv-07852-YGR

**Plaintiff's Response to Motion
for Reconsideration**

Complaint Filed: October 6, 2021

Honorable Yvonne Gonzalez
Rogers

MEMORANDUM OF POINTS AND AUTHORITIES

I. Procedural History

4 Plaintiff filed his Complaint alleging violations of the ADA on
5 October 6, 2021. Dkt. 1. Defendant then moved to dismiss the Complaint
6 on December 13, 2021, on the grounds that Plaintiff lacked standing
7 because Defendant does not operate a brick-and-mortar facility and
8 Plaintiff “could not possibly qualify for a loan.” Memorandum page 4, Dkt.
9 13-1. In denying Defendant’s motion, the Court concluded that it raised
10 factual questions not appropriate for resolution on the pleadings and
11 refrained from deciding the facts at this early stage of the case. Order, Dkt.
12 18, page 2. Defendant filed a Motion for Reconsideration on March 28,
13 2022, citing to *Gomez v. Gates Estates, Inc.*, Case Number: 3:21-cv-07147-
14 SK. This brief is filed in response to the Court’s March 29 Order directing
15 briefing. Dkt. 21.

II. Basis for jurisdiction

The Court's order draws attention to a Declaration Plaintiff submitted in *Gomez v. Gates*. There, Mr. Gomez also was suing a real estate agency in the Bay Area that lacked accessible elements. That court dismissed Gomez's claim for failure to state a claim due to Gomez's statement that he would not physically visit the business. This was in error.

Not only was this legal error not supported by *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019), it represents a rejection of both the Ninth Circuit position on tester standing and the Department of Justice

1 position on accessibility of websites, which have been published since that
 2 decision.¹

3 Defendant's suggestion that Mr. Gomez must intend to visit "as a
 4 customer" is *explicitly* rejected by *C.R. Educ. & Enf't Ctr. v. Hosp. Properties*
 5 *Tr.*, ("CREEC") 867 F.3d 1093 (9th Cir. 2017). CREEC provides that "any
 6 person who is being subjected to discrimination on the basis of disability'
 7 may bring suit." *Id.* at 1102. Further, his motivations for patronizing the
 8 website have no relevance whatsoever to his standing. *Id.* at 1101.

9 As for the application of the ADA to websites, the DOJ has stated the
 10 importance of "understanding how to ensure that websites are accessible to
 11 people with disabilities." Department of Justice, *Justice Department Issues*
 12 *Web Accessibility Guidance Under the Americans with Disabilities Act*,
 13 [https://www.justice.gov/opa/pr/justice-department-issues-web-](https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act)
 14 [accessibility-guidance-under-americans-disabilities-act](https://www.justice.gov/opa/pr/justice-department-issues-web-accessibility-guidance-under-americans-disabilities-act) (March 18, 2022).
 15 Going further, "[p]eople with disabilities deserve to have an equal
 16 opportunity to access the services, goods and programs provided by
 17 government and businesses, including when offered or communicated
 18 through websites." *Ibid.* In the full guidance, the DOJ explains that website
 19 compliance is necessary to ensure that communication with people with
 20 disabilities is as effective as communication with others. Department of
 21 Justice, *When the ADA Requires Web Content to be Accessible*,
 22 [https://beta.ada.gov/web-guidance/#when-the-ada-requires-web-](https://beta.ada.gov/web-guidance/#when-the-ada-requires-web-content-to-be-accessible)
 23 [content-to-be-accessible](https://beta.ada.gov/web-guidance/#when-the-ada-requires-web-content-to-be-accessible) (March 22, 2022).

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25 ¹ The *Gates* decision was not appealed for reasons unrelated to the merits
 26 of that court's particular order. However, it is not binding authority on
 27 this court, and this court should not follow the lead of *Gates* as the
 28 decision fails to comport with Ninth Circuit precedent on both standing
 and the breadth of the ADA.

Website barriers are specifically called out, such as poor color contrast, lack of text alternatives on images, inaccessible online forms, mouse-only navigation, and lack of captions on videos. Department of Justice, *Examples of Website Accessibility Barriers*, <https://beta.ada.gov/web-guidance/#examples-of-website-accessibility-barriers>. (March 22, 2022). The barriers complained of by Plaintiff in this case are included in this list. Complaint para. 18, Dkt. 1.

To the extent any Ninth Circuit precedent can be interpreted as the ADA not applying to websites, DOJ has unequivocally stated this is incorrect and that the ADA “intended for the ADA to keep pace with rapidly changing technology of our times.” Department of Justice, *Web Accessibility for People with Disabilities is a Priority for the Department of Justice*, <https://beta.ada.gov/web-guidance/#web-accessibility-for-people-with-disabilities-is-a-priority-for-the-department-of-justice>. (March 22, 2022).

The DOJ’s enforcement of the ADA reflects this position. In 2014, the DOJ reached a Settlement Agreement with Peapod, LLC, an online grocery delivery service, to address accessibility claims. Available online at https://www.ada.gov/peapod_sa.htm. In that Agreement, the DOJ stated that “[i]ndividuals who are deaf or hard of hearing cannot understand videos presented on the website because the captioning is inaccurate ... Because of such barriers, individuals with disabilities are unable to fully and equally access www.peapod.com for online grocery shopping.” *Id.* at ¶4. Peapod was identified as the owner/operator of www.peapod.com and “a public accommodation subject to Title III of the ADA.” *Id.* at ¶7.

Likewise, in 2018, the DOJ entered into a settlement agreement with Teachers Test Prep (“TTP”), an entity that provides online and in-person test preparation courses. Available online at https://www.ada.gov/ttp_sa.html. In that Agreement, the DOJ noted that

1 TTP “did not offer its online courses in a manner accessible to individuals
 2 with hearing disabilities[.]” *Id.* at ¶5. As part of the Settlement Agreement,
 3 TTP agreed to “ensure *all* of its online video content has captions.” *Id.* at
 4 ¶9(c) (emphasis added). There was no exception made for videos of courses
 5 that were not also offered in-person, or even for videos that were provided
 6 solely for informational or marketing purposes.

7 Agency deference is necessary when there is ambiguity in the statute,
 8 and the Ninth Circuit in both *Weyer v. Twentieth Century Fox Film Corp.*, 198
 9 F.3d 1104, 1114 (9th Cir. 2000) and *Robles*, *supra*, recognized the lack of
 10 clarity in attempting to fashion a rule. The numerous methods various
 11 courts have used to apply the ADA’s provisions to the internet demonstrates
 12 the lack of clarity. Given this, and the superseding language of the DOJ,
 13 agency deference is mandatory. *Kisor v. Wilkie*, 139 S.Ct. 2400, 2422
 14 (2019) (confirming *Auer* deference remains); *Johnson v. Starbucks*
 15 *Corporation*, 17-02454 WHA, 2019 WL 1427435, *3 (March 29, 2019) (J.
 16 Alsup) (applying *Auer* deference to agency interpretation of the ADA).

17 It is therefore not necessary that an individual intend to visit the
 18 physical business in order to sue for lack of accessibility of the website. In
 19 fact, the seminal case on this issue in the Ninth Circuit, *Robles*, involved facts
 20 not terribly dissimilar to those alleged here. There, the plaintiff had zero
 21 intention to visit the physical location of Domino’s, but instead was utilizing
 22 the website to obtain benefits without ever intending to physically visit the
 23 store. *Robles*, 913 F.3d 898 at 902. It is a skewering of the “nexus” concept
 24 to suggest that a website need only be compliant and offer benefits to
 25 patrons who intend to physically visit the business. This effectively makes
 26 accessibility an illusion. The internet is a boon for people with disabilities,
 27 providing access to goods and services previously unavailable to them.

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1 In the case of Mr. Gomez, the digital version of the terrestrial services
2 offered by Defendant are far superior as they can be read by his digital
3 devices. Why would someone with significantly visual disabilities do with
4 printed paper when he can have a digital version read to him audibly? It is
5 simply immaterial if he has any intention to visit the physical location, all
6 that matters is whether the benefit he wished to avail himself of was offered
7 by a physical place of public accommodation.

8

9 **III. Conclusion**

10 Plaintiff therefore asks that the court deny the Motion for
11 Reconsideration.

12 Dated: April 12, 2022

13 CENTER FOR DISABILITY ACCESS

14 By /s/ Elliott Montgomery
15 Elliott Montgomery
16 Attorney for Plaintiff

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